

THE INSTITUTIONAL MORASS:
CONSTRAINTS AND OPPORTUNITIES FOR ISSUE MANAGEMENTHolly C. Hartmann¹ and Michael J. Donahue²

ABSTRACT: A critical link exists between government policies and the institutional milieu which exists to fulfill those policies. Ostensibly, the large number of institutions which influence use of the Great Lakes leads to public confusion and a perception of institutional unresponsiveness. However, the current institutional setting is actually a rational response to several characteristics inherent to the Great Lakes system and government behavior; elimination of institutions simply to reduce the number of players is inappropriate. Rather, the exclusive and adversarial nature of traditional agency decisionmaking processes appears to be a pivotal problem. Future planning must incorporate Alternative Dispute Resolution (ADR) processes, which seek to build consensus among the various interest groups (agencies included) that have some stake in Great Lakes management decisions. For many contentious Great Lakes issues, ADR uniquely offers the potential for mutual learning by groups as their assumptions and perceptions are evaluated by other groups during facilitated policy dialogues, collaborative problem-solving, or negotiations.

KEY TERMS: Great Lakes; dispute resolution; institutions; water management

THE ROLE OF INSTITUTIONS

An inextricable linkage exists between the policies of a government and the institutional arrangements and processes that exist to fulfill those policies. Institutions - at any level of government - are not merely vehicles for operationalizing policies formulated by legislatures or officials of a given administration. Rather, institutions can determine the success or failure of a given policy, and even the very existence of that policy. Institutions provide an environment in which policies can be devised, altered, interpreted, advocated, ignored, or otherwise transformed. Examples of this linkage include institutional adjustments of budgetary allocations, and the issuance of guidelines that serve to, de facto, interpret executive, legislative, or judicial policies.

In addition, there is an immutable relationship between the public's perception of a problem and that of the government institutions responsible for administering policies to mitigate the problem. When a governmental entity responds to a perceived problem in a delayed or otherwise inadequate manner, the

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differentiation between the problem and mitigation effort is often blurred; the agency is viewed as a contributor to the problem rather than a provider of a solution (Ostrom et al., 1970). The complexity of institutional arrangements in policy administration is problematic as well; a complex and seemingly irrational system typically results in public confusion, coordination and administrative inefficiencies, and less than optimal mitigation strategies. The common perception is that of governmental unresponsiveness, of the agencies trying to grapple with "problems of much simpler times" (Hennigan, 1970).

The disparity between government policies (Shoots and Shabman, this volume) and the positions of interest groups (Ludlow and O'Grady, this volume) suggests shortcomings in the existing structure or operation of governmental institutions. Any institutional response must be devised and assessed in the broader context of the overall governance system of the basin. The governance system includes the multitude of public and private entities that set or influence policy as well as the formal and informal linkages and interactions among them. Over time, the Great Lakes governance system has evolved into a complex management framework in which responsibilities are allocated between and among an array of public entities in the federal, state, provincial, local, and international arenas. It also has recently evolved to include non-governmental organizations that, de facto, have authority to influence management. Any new institutional response must acknowledge, accommodate, and work within this framework to acquire the support needed for effective implementation.

THE ISSUE OF COMPLEXITY

The existing (and, in fact, historical) Great Lakes governance system is commonly and quite accurately portrayed as a complex, dynamic, and rather loosely defined amalgam of governmental and private sector entities with the authority to manage, or the ability to influence the management of, basin resources. The institutional arrangements within this governance system are almost overwhelmingly complex. The eight states and two provinces that share the basin each have their own governmental structure in place to manage their vested interests in the basin's resources. Well over a dozen federal agencies, U.S. and Canadian, have a mandated interest in the basin's resources. Literally hundreds of other governmental entities are charged with some responsibility relating to the lakes as well, including regional and international agencies, townships, counties, and municipalities. Each of these agencies has their own associated laws, agreements, mandates, directives, and programs.

The current institutional setting is actually a rational response to several inherent characteristics of the Great Lakes system and governmental behavior. Certainly, by virtue of its expansiveness alone, one might infer that management of Great Lakes resources demands a complex, multijurisdictional approach. Water bodies have historically been used as convenient lines to separate political jurisdictions, and the Great Lakes Basin is no exception. In addition, the nature of the system, essentially a series of large reservoirs with continuous but constrained outflows, has historically obscured the interconnectedness of the lakes and the need for system-wide management. Thus, many governmental units were organized to focus only on hydrologically distinct parts of the system. The Great Lakes Basin also represents an intensively used "common pool" resource shared among a wide variety of interests, each seeking to influence (directly or indirectly) resource management policies and programs of government institutions.

At all levels of government, resource management functions tend to be compartmentalized and geographically defined, to focus on specific constituencies. Hence, there is a large number of governmental entities throughout the region, with many distinct policies, programs, and management functions; even when agencies share similar goals, they generally have distinctly local orientations. Finally, despite its importance to the region, the Great Lakes system is not the dominating economic, social, or political feature. Water resource management must be accommodated within the organization of other governmental functions (e.g. transportation, education, economic development, social support).

Institutional complexity also results from adaptation to new knowledge, whether scientific, social, or political. Adaptation of the institutional setting to emergent knowledge culminates in one of three responses: 1) internal reordering and/or expansion of management processes within existing institutions, 2) formation of inter-institutional linkages, or 3) creation of new institutions. In each case, increased complexity is the outcome. These responses largely result from the tendency toward institutional inertia endemic among governmental bureaucracies. The adaptation of government structures to a changing environment is typically subtle; changes are, in general, incremental and prolonged. Great Lakes governmental entities and their linkages are largely products of this phenomenon of "dynamic conservatism." Rather than subject themselves to dramatic change to address emerging challenges, established institutions appear willing to sanction (or at least practice indifference to) new mechanisms. As a result, numerous regional institutions have been established over the years, each carefully designed to remain accountable to established political jurisdictions, while filling previously unaddressed needs.

Institutional complexity does pose some difficulties. While both federal governments, upon close examination, have clear and consistent policy themes promoting informed private-sector decision making and prohibiting cost-shifting to the environment or general taxpayers (Shoots and Shabman, this volume), general perceptions are that no such clear expectations exist. Thus, management organizations seldom receive the appropriate level of attention and oversight to evaluate their success in meeting policy expectations. In addition, marginal performance tends to be rewarded by silent approval, as it generally raises fewer "turf protection" issues that could trigger the active interest of numerous jurisdictions. Institutions that do lose in "turf battles" (due to being less efficient or adaptable than other institutions) don't cease to exist, but generally remain as marginally functioning components within the overall institutional setting. In the words of Schon (1971), "the organizational equivalent of biological death is missing." Correction of such tendencies requires establishment of measurable goals and objectives, a system of accountability for institutions, performance evaluation procedures, and a mechanism to withdraw "marginal" institutions.

However, complexity doesn't appear to be the primary institutional problem at all. Based on interviews and questionnaires administered to a cross-section of individuals associated with Great Lakes management efforts, Donahue (1987) found that those individuals knowledgeable about the governance system didn't consider sheer complexity to be a significant problem. As Donahue points out, the problem of jurisdictional complexity is "undoubtedly overstated by a generally ill-informed, confused public and milieu of special interest groups." Thus, consolidation or outright elimination of institutions for the sole purpose of reducing the number of "players" is inappropriate; concerns of inefficiency or ineffectiveness must also be present.

As suggested by Donahue (1987) and confirmed by Ludlow and O'Grady (this volume), the abundance of agencies and organizations, each with their own associated laws, agreements, mandates, and directives, can be overwhelming for interest groups wanting to ensure that their concerns are incorporated into Great Lakes management, especially if they are not well-informed about the governance system. Thus, among some interest groups (e.g. some riparian groups) there is a strong sentiment for establishing a central authority responsible for overall Great Lakes management. Such sentiment also plays on the typical preoccupation that political leaders have with "newness", who find it more advantageous to create new institutions or institutional mechanisms than to review and refine existing ones. However, any central authority would face the same limitations as existing regional institutions.

Regional institutions are embodiments of, and therefore constrained by, the prevailing political support of member jurisdictions. They generally have only limited autonomy, being directed by and therefore accountable to, the political jurisdictions which comprise their membership. At times, their political support can be limited, as their member jurisdictions spurn regional cooperation when domestic interests are of more immediate concern. In brief, regional institutions can do only what the member political jurisdictions allow them to do.

THE CURRENT DECISION MAKING PROCESS

Problems related to existing institutional structures and operation appear to be more serious than the problem of complexity. In particular, relatively recent social changes have tremendously reduced the effectiveness of traditional decision making processes.

It is becoming increasingly difficult to develop implementable resource management decisions using the traditional administrative procedures of the past several decades. More interest groups, with a greater diversity of concerns and values, are involved in trying to influence resource decisions than ever before, and agencies are finding it difficult to satisfy all these competing interests. Although many resource decisions are initially made by government agencies using established administrative procedures, the final decisions are increasingly being decided through the courts after a suit is filed by a group disgruntled with an agency decision, or by new legislation after a group takes an agency decision into the political arena. As a consequence, the resolution of resource disputes is becoming more costly in terms of expenditures, agency resources, opportunity costs, and time. Decisionmaking can be stymied for years in administrative appeals, legislative hearings, and legal battles. In addition, key issues that are really at the heart of the dispute aren't always addressed; instead, groups contest agency decisions on procedural grounds. Because the issues that underlie the conflict aren't addressed, the conflicts typically aren't really resolved, and they simply manifest themselves in other resource disputes.

The standard approaches traditionally used by agencies to address the concerns of diverse groups interested in a specific problem include public involvement campaigns and opportunities for public review and comment. Agencies ask for public input, conduct the evaluations themselves, return to ask for public review, and then make the decisions internally. The agencies assume that the public will recognize and appreciate the logic, objectiveness, and rationality of their evaluations and decisions. However, the interest groups only see a

"black box"; they don't see how their input affected decisions, how their concerns were accommodated or why they couldn't be, how the issues were synthesized, or the rationale in getting to the final decision. As interest groups become more numerous and diverse, it gets harder for agency personnel to fully appreciate the merits of all the interests and forecast what tradeoffs will be acceptable to each group. In addition, not even scientists and governments can make technical judgments without also making value judgments; unfortunately, those technical judgments simply obscure the critical value choices that were made. Relying on professional expertise to assess values and make the inevitable tradeoffs results in mistrust of those "experts" and dissatisfaction of interest groups affected by the decision.

Because of dissatisfaction with the traditional decision making process and the resulting decisions, interest groups are likely to contest the evaluations when the stakes are high. Typically, the groups contend the evaluations were incomplete or inaccurate, the process was flawed or subjective, or that the resulting decisions allocate resources in an unfair or inefficient manner. These disputes over the evaluation or decision can harm an agency's image and effectiveness in other areas.

Strong dissatisfaction with agency decision making has been identified by Clamen (1988) in a review of past IJC water level studies. The economic analyses have been criticized for the use of a rather "narrow view" of economics as the bottom line for recommendations on alternative measures, for not recognizing the possibility or costs of remedial or compensatory measures, and for ignoring a range of evaluative criteria, especially social and environmental criteria. This suggests that, had the IJC studies resulted in any agency actions to implement measures (beyond the "do nothing" and "additional study" measures actually implemented), there would have been demands for more analyses and reevaluation, and perhaps actions to prevent implementation. Demands from some interest groups dissatisfied with those past IJC water level studies resulted in the present Great Lakes Water Levels Reference Study and reflect the ability of those groups to influence government action. Given the disparate perceptions, values, and concerns of the many Great Lakes interest groups, it seems inevitable that there will be dissatisfaction with results of the present reference study which call for implementing or not implementing specific measures; that dissatisfaction will likely be expressed by action in legal or political arenas, to prohibit or force specific measures or reevaluation.

TOWARD ENHANCED DECISION MAKING CAPABILITIES

Better issue management and resource decisions are possible by improving the process for making decisions. The key change must be to attempt to build consensus among the various interest groups that have some stake in a resource decision. There are many approaches for trying to achieve this consensus, all generically termed alternative dispute resolution (ADR) processes. The distinguishing characteristics of an ADR process are that 1) interest groups are actively included in developing and assessing alternatives and in making tradeoffs between alternatives, and 2) issues are decided on their merits rather than on the mettle of the various interest groups. The four principles of ADR are: 1) focusing on the issues, not the individuals or groups involved, 2) focusing on understanding the positions of the interest groups and the concerns which under-

lie their positions, 3) inventing options that provide for mutual gains, and 4) using objective criteria, both for assessing substantive issues and for procedures (Fisher and Ury, 1981).

ADR processes are especially important when the issues are complex, decisions require value judgments, and when technical expertise is limited. There exists a wide variety of ADR approaches available for use in public resource conflicts, differing primarily by the level of involvement of a neutral intervenor and the goals of process. These approaches include unassisted negotiation, facilitated policy dialogues, collaborative problem solving, mediated negotiation, non-binding arbitration, and binding arbitration.

ADR processes offer important advantages over traditional approaches to dealing with the conflicts inherent in resource issues and decision making. The interest groups focus directly on the issues of concern, not simply on stated preferences regarding alternatives that might only indirectly satisfy their concerns. The groups focus their energies on devising and supporting mutually acceptable proposals, instead of finding fault with agency decisions. Because the interest groups are actively included in the actual decision making process, they develop a sense of ownership in the problem and the solution; thus, they have a stake in seeing that the ultimate decision is supported and implemented. Consensus between competing interest groups enhances the credibility of the decision among the general public and may help implementation endure even through changing political conditions. Interactions between competing interest groups and agencies are shifted from the adversarial nature of administrative hearings and public review (often viewed as "charades" by the participants), to the more positive nature of collaborative problem-solving, improving prospects for better long-term relationships and discussions on other issues as well.

For disputes with a strong technical dimension, ADR uniquely offers the potential for groups to change their positions based on the learning that occurs during direct dialogue with other groups. Negotiations foster critical questioning of each group's assumptions and rationale for their positions, and expose inconsistencies or inadequacies in their perceptions. As each group learns the merits of other groups' positions, they must reevaluate the adequacies of their own. While this learning process doesn't guarantee that groups will change their position, ADR provides a much better opportunity for it to occur than traditional public involvement efforts.

The process also can offer important advantages to agencies faced with making decisions that are otherwise likely to be controversial. The primary benefit is the increased efficiency of the entire management process. While the initial decision making may take longer, the decisions are less likely to be contested and implementation proceeds much smoother. Risks for extended conflicts between the agency and groups are reduced, as are the adverse publicity and severe drains on agency resources that usually result from formal hearings and administrative appeals. Prospects are improved for voluntary compliance with any agency mandates resulting from the process.

Special Considerations

At least some government agencies will usually have to approve any agreement produced via an ADR process, and many agencies control the means for implementation. Those agencies must be considered as interest groups and included in

that capacity in any ADR process. Without their participation, the agencies will likely be unable to support the agreement or its implementation due to inconsistencies (process or substance related) with their statutory mandates. Including agencies as ADR participants also helps maintain a high level of commitment to the use of the process on the part of groups that will have a continuing relationship with the agency; those groups may have difficulties with the agency on other matters unless they participate fully and in good faith. Different government agencies, even from the same level of government, may need to be considered as different interests. Due to the plethora of legislation affecting a single resource, there are often disputes among agencies based on their jurisdiction, conflicting statutory mandates, their focus on serving different clientele (e.g. energy, commercial fishing, wetland interests), and different agency styles and operating procedures. These conflicts may also exist among different units within an agency, requiring that they be considered as different interest groups as well.

Where many issues and participants are involved, a team of mediators may be most effective at managing the ADR process. It's essential that mediators be perceived by all involved groups as non-partisan. In addition, any resulting agreements are more apt to be seen as fair and efficient by the general public if a mediator is well-known and widely respected. Mediators must be acceptable to all parties, capable of using ADR techniques, and capable of understanding the technical issues underlying the dispute.

Where perceptions, values, and concerns coincide between groups, there is certainly potential for discovering alternatives to satisfy those groups. However, disagreement about them doesn't preclude eventual agreement on a solution. In fact, those differences make tradeoffs possible, because one group may see a specific component of an alternative as providing large benefits while another may see it as only costing a little. Some common differences among interests that make tradeoffs possible include economic vs. political considerations, symbolic vs. practical considerations, short-term vs. long-term time horizons, precedent vs. concern for just this dispute, and the acceptability of monetary vs. non-monetary compensation. Differences among interest groups in their probability estimates of uncertain future conditions (e.g. economic, climatic) can be accommodated via contingency agreements; given their different projections of the future, each group can, in effect, "bet" so as to maximize their respective expected values. Differences in risk tolerance can lead to risk-sharing agreements, with the more risk-tolerant groups obtaining gains of some other type as compensation from risk-averse groups.

ADR AND THE WATER LEVELS ISSUE

ADR processes hold tremendous promise for dealing with water levels issues in the Great Lakes-St. Lawrence River Basin. Examination of the present Great Lakes institutional structure reveals that, even with the large number of diverse government organizations, there is no focused forum for ADR among interest groups (including government organizations). Regardless of incentives, the groups have little or no opportunity to explore options for tradeoffs, compensations, or joint gains. Forums are required on several levels to manage issues involving different levels of government.

As Shoots and Shabman (this volume) explain, there is strong consistency between U.S. and Canadian federal policies calling for informed private sector risk-taking and prohibition of cost-shifting to the environment or general taxpayers. However, that consistency is often overlooked by interest groups, and there are important differences in other policies (e.g. support for hydropower, waterborne navigation, recreation) that affect Great Lakes management. In addition, each federal government has concerns about preserving its sovereignty and the primacy of the federal level of government vis-a-vis the states and provinces. On the other hand, the state and provincial governments clearly play a critical role in Great Lakes levels issues; they have tremendous responsibilities (delegated and Constitutionally-derived) related to use of the lakes. The Great Lakes Charter and the Great Lakes Protection Fund illustrate that the state and provincial governments recognize that their commitment to collective action promises increased benefits for all, but the states and provinces also have concerns about program funding, their sovereignty, and their role vis-a-vis the federal governments.

A facilitated policy dialogue or collaborative problem solving process involving the federal, state, and provincial governments could serve to make clear the consistencies between policies among the jurisdictions, and their joint and separable obligations to implement programs consistent with those policies. An important product of either process would be a consensus statement concerning their common policies and joint and separable obligations. Such a statement could be embodied as a convention, agreement, charter, memorandum of understanding, joint communique, or as diplomatic notes, depending on the level of stature the participants would be willing to vest in their consensus statement. Recognizing the U.S. federal government's historical reluctance to allow the states an equal role at the policy-setting level, any ADR process may need to be conducted on several levels, with consensus statements developed at joint federal/state, and federal/provincial levels. Even if the U.S. federal government were unwilling to involve the states in such a process, a consensus statement between the U.S. and Canadian governments would still provide a clearer understanding of the federal policies affecting Great Lakes interest groups.

Where binational or large-scale regional concerns are involved, a forum for ADR would be most appropriate within the IJC. The IJC is recognized as having a firm legal basis for managing boundary waters conflicts, having a system-wide orientation, being able to provide for joint consideration of U.S. and Canadian concerns, being relatively impartial, having prestige and a positive public image, and having a solid technical capability within its staff, boards, and commissions (Donahue, 1987). Use of ADR would not require any new authority for the IJC, since Title X of the Boundary Waters Treaty of 1909 empowers the IJC with a binding arbitration function in cases consented to by the U.S. Senate and the Governor General in Council in Canada. While Title X has never been invoked to manage boundary waters conflicts, the use of ADR by the IJC does have precedent (Kirn and Marts, 1986). In resolving the decades old dispute over hydropower development and flooding in the Skagit River Valley of Washington and British Columbia, the willingness of the IJC to assert its authority to arbitrate the dispute and then create a suitable forum for an ADR process was critical to successful resolution of the conflict. Although not the original goal of the ADR process, the final agreement was culminated in a binational treaty between the U.S. and Canada, and additionally ratified by a province and a U.S. municipality.

ADR processes can also serve as a vehicle to inform specific interest groups about the Great Lake system, its governance system, and the concerns of other interest groups. ADR fosters critical questioning of each group's assump-

tions and rationale for their positions, and can expose inconsistencies or inadequacies in their perceptions. As each group learns the merits of other groups' positions, they must reevaluate the adequacies of their own. This mutual learning on the part of the various interest groups can be best assured by using as interest group representatives those individuals that are influential within their group, and by making use of a facilitator or mediator.

Considering the tremendous number of interest groups throughout the Great Lakes system, use of ADR to foster mutual learning among specific groups would be most effective when managing disagreement or resolving disputes on a more local level (e.g. planning shore protection projects, developing shoreline use regulations, determining the distribution of costs associated with a dredging program). Used in this manner, the success of ADR should be judged on the extent to which the process 1) helps the groups obtain a sound knowledge about the facts surrounding the decisions to be made, 2) helps the groups clearly understand the relevant formal and informal precedents affecting the decisions to be made, 3) helps the groups develop an accurate knowledge of the concerns and strategic options of all groups involved in the dispute, and 4) persuades the groups to act according to clear perceptions about the facts, precedents, and the concerns and options of all disputing interest groups. Success will be contingent upon lead agencies making the commitment to use ADR in their decision making and clearly defining the goals of the process. Without a clear goal, the process may founder as participants are uncertain whether they are expected to reach agreement or simply acknowledge the perspectives of other interest groups.

For issues restricted to a more local level, federal, state/provincial, or non-governmental forums for ADR may be more appropriate. Although a forum within the U.S. Army Corps of Engineers (USACE) or Environment Canada may be suitable, the use of agency personnel as mediators would be inappropriate where decisions by those agencies are required (e.g. where they must approve agreements or where they control the means for implementation of any agreement, via funding or the issuing of permits). Rather, either agency should be considered as a separate interest group, or as the lead agency making a commitment to use ADR to settle a dispute among interest groups and to proceed according to the agreement developed by the groups. In such cases, interest groups may accept a mediator from a government agency with no involvement in any potential decision making (e.g. the U.S. EPA or NOAA mediating ADR concerned with a joint USACE/state/municipality shore protection project). Where the dispute involves only state/municipal or provincial/municipal interests, a federal agency mediator (including the USACE or Environment Canada) may be appropriate. The role of non-governmental organizations (those with broad resource management interests and capable of impartial and independent functions, not those with a narrow issue-oriented focus directed at advocacy of their views) in providing a forum for ADR or acting as mediators should not be overlooked. Use of these organizations may be appropriate for disputes operating at federal, regional, state/provincial, and local levels.

SUMMARY AND CONCLUSIONS

The complex institutional setting for Great Lakes governance is a reality that must be accommodated in any attempt to improve management of Great Lakes water level issues. Efforts to establish measurable goals and objectives for institutions, systems of accountability, performance evaluation procedures, and mechanisms to withdraw marginal institutions have more potential for improving insti-

tutional effectiveness than creation of any new, omnipotent regional authority. A critical shortcoming in the present institutional setting is the lack of established forums for alternative dispute resolution (ADR) processes that can foster mutual learning among interest groups, including government agencies. For disputes with a strong technical dimension, ADR uniquely offers the potential for groups to change their positions based on learning that occurs through direct dialogue with other groups. For binational or large-scale regional lake level issues, an ADR forum provided by the IJC is most appropriate. Commitment to use ADR processes as a first approach for managing disagreements over water levels issues does not require additional IJC authority; existing provisions of the Boundary Water Treaty of 1909 are sufficient. For local water level issues, effective forums could be provided by federal, state/provincial, or regional agencies (inter- and intrastate/provincial) that have no direct involvement in decision making concerning the specific issue, or by non-governmental organizations that have broad resource management interests and are capable of impartial and independent functions.

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